MOTION FILED
MAR 2 9 2004

(2)

No. 03-1261

In The
Supreme Court of the United States

ROCHELLE BROSSEAU, A CITY OF PUYALLUP, WASHINGTON, POLICE OFFICER,

Petitioner,

v.

KENNETH J. HAUGEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; and BRIEF *AMICUS CURIAE* OF POLICE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA LEGAL DEFENSE FUND AND OTHER GROUPS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL JOHN HANSEN
GARRETTSON, GOLDBERG, FENRICH & MAKLER, P.C.
5530 SW Kelly Avenue
Portland, OR 97239
503-226-3906

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION

The Police Officers Research Association of California Legal Defense Fund (Fund) hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. Joining in this request are the following member affiliates of the Fund: Peace Officers Research Association of California, Peace Officers Research Association of Nevada, Arizona Police Association, National Border Patrol Council, Operating Engineers Union Local No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations, and Wyoming Highway Patrol Association. Also joining in this request are the following non-member groups: National Association of Police Organizations, and Washington Council of Police and Sheriffs. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the Fund arises from the fact that the circumstances giving rise to the use of deadly force by Officer Brosseau in this case are familiar to peace officers served by the Fund, which is an organization providing prepaid group legal services to peace officers for matters related to their employment. The Fund, its affiliates, and the other groups serve peace officers throughout the western United States including the states of Colorado, Montana, Wyoming, Nevada, Utah, California, Oregon and Washington. Clear and consistent federal case law is necessary to give practical guidance to peace officers and their employers on the use of deadly force in similar circumstances. Not only is such guidance necessary for the proper working of the qualified immunity defense, but

such guidance serves to protect the safety of peace officers and the community, and to protect the interests of peace officers in fair and just employment-related discipline and potential criminal liability.

In the instant case the Ninth Circuit Court of Appeals has rendered a decision that de-emphasizes the perspective of the peace officer who must make the split-second decision whether to employ deadly force. This perspective includes the potential of a vehicle as a deadly weapon, and the risk of delay in the timing of the peace officer's decision in a dangerous and uncontrolled situation where the threat of a weapon, such as a gun, may be present as well.

Peace officers are tasked with protecting the security of the community and preventing harm. Peace officers need to know when the threat of harm is sufficiently severe and imminent to warrant the use of deadly force and how to make that assessment in the field from the perspective of the peace officer. It is believed that the brief *amicus curiae* is requesting permission to file will provide this perspective and demonstrate the need for review of this case to ensure federal case law gives the practical guidance and fair warning peace officers need to do their jobs lawfully. The analysis employed by the Ninth Circuit in the *Haugen* case creates a split in opinion among the circuits concerning the proper use of deadly force for peace officers in similar circumstances, and thereby subjects

peace officers to trial due to the denial or uncertainty of the defense of qualified immunity.

Respectfully submitted,

MICHAEL J. HANSEN
Counsel of Record
GARRETTSON, GOLDBERG, FENRICH
& MAKLER, P.C.
5530 SW Kelly Avenue
Portland, OR 97239
503-226-3906

Attorneys for Amicus Curiae

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
1. Peace Officers Have an Interest in Clear and Consistent Case Law on the Use of Deadly Force	2
2. A Peace Officer Must Be Able to Assess a Dangerous Situation Involving the Use of Deadly Force Immediately	3
3. The Ninth Circuit's Decision Creates a Split Among the Circuits That Denies Fair Warning to Peace Officers	6
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Saucier v. Katz, 533 U.S. 194 (2001) 10

Haugen v. Brosseau, 339 F.3d 859 (9th Cir. 2003) .... *passim*

Pace v. Capobianco, 283 F.3d 1275 (11th Cir. 2002) 7, 8

Thompson v. Hubbard, 257 F.3d 896 (8th Cir. 2001) 9, 10

Scott v. Clay County, 205 F.3d 867 (6th Cir. 2000) 7, 8

Smith v. Freland, 954 F.2d 343 (6th Cir. 1992) 7, 8

Reese v. Anderson, 926 F.2d 494 (5th Cir. 1991) 7, 9

State v. Hill, 298 Or. 270, 692 P.2d 100 (1984) 6

STATUTES

Rev. C. Wash. 9A.04.110(6) 5, 6

STATEMENT OF INTEREST

Amicus Curiae represents the Police Officers Research Association of California Legal Defense Fund (Fund), its member affiliates: Peace Officers Research Association of California, Peace Officers Research Association of Nevada, Arizona Police Association, National Border Patrol Council, Operating Engineers Union Local No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations, and Wyoming Highway Patrol Association, and the following non-member groups: National Association of Police Organizations, and Washington Council of Police and Sheriffs. The Fund is an organization providing prepaid group legal services to peace officers and public safety employees for matters related to their employment.[1] The Fund provides services to peace officers and public safety employees throughout the western United States including the states of Colorado, Montana, Wyoming, Nevada, Utah, Washington, Oregon and California. The Fund employs a panel of attorneys, such as Garrettson, Goldberg, Fenrich & Makler, P.C., which represents over 90 law enforcement unions throughout the states of Oregon and Washington.

Petitioner, Rochelle Brosseau, has consented to filing this brief. Respondent, Kenneth J. Haugen, has not consented to filing this brief.

---

[1] Counsel for a party did not author any part of this brief. The PORAC Legal Defense Fund made the entire and sole monetary contribution to preparation and submission of this brief.

The Fund supports the Petition for Writ of Certiorari. The decision in *Haugen v. Brosseau*, 339 F.3d 859 (9th Cir. 2003) raises uncertainty concerning the use of deadly force that adversely affects the personal liability and employment relations of the members of the Fund.

SUMMARY OF ARGUMENT

Peace Officers have a strong interest in clear and consistent case law on the lawful use of deadly force in circumstances similar to those faced by Officer Brosseau in the *Haugen* decision of the Ninth Circuit. In particular, it is not uncommon for peace officers to face circumstances where an apparently dangerous and desperate suspect seeks to flee in a vehicle or appears to be reaching for a weapon. Peace officers must be able to assess the situation immediately to determine if the use of deadly force is justified. The Ninth Circuit decision in *Haugen* creates a split among the circuit courts, and denies peace officers fair warning of whether deadly force may be lawfully used in similar circumstances.

ARGUMENT

1. Peace Officers Have a Strong Interest in Clear and Consistent Case Law On the Use of Deadly Force.

Peace officers have a strong interest in clear and consistent case law that gives practical guidance and fair warning on the proper use of deadly force. The goal of law enforcement is the security of the community and the prevention of harm to the community. A peace officer must

be able to anticipate what a suspect will do in dangerous and uncontrolled circumstances, and be ready to take appropriate, legal action. The issue of personal safety and the safety of others is at stake. Personal civil liability is at issue. Potential employment-related discipline, criminal charges, and adverse actions affecting job assignments and career development are at stake. A strong community interest is at stake. Public anger and questions may continue unabated. Employers may respond to public frustration through some form of discipline or reassignment as a compromise unlikely to satisfy the legitimate concerns of anyone.[2]

2. A Peace Officer Must Be Able to Assess a Dangerous Situation Involving the Use of Deadly Force Immediately.

Officer Brosseau's assessment of dangerousness included circumstances often confronted by peace officers when making split-second decisions in the milieu of an ongoing chase of a suspect in dangerous circumstances. Haugen's history of drug abuse included frequent use of methamphetamine. Methamphetamine is widespread in the Western United States. Statistical reports on the number of meth labs can be found at www.usdoj.gov/dea/statisticsp.html. Meth users tend to violent and unpredictable behavior. A National Institute of Drug Abuse report states:

> "Long-term methamphetamine abuse results in many damaging effects, including addiction.

[2] *See* The Oregonian Newspaper, *Cops: Desperate for Witness Protection* by Steve Duin, dated February 19, 2004.

> Addiction is a chronic, relapsing disease, characterized by compulsive drug-seeking and drug use which is accompanied by functional and molecular changes in the brain. In addition to being addicted to methamphetamine, chronic methamphetamine abusers exhibit symptoms that can include violent behavior, anxiety, confusion, and insomnia. They also can display a number of psychotic features, including paranoia, auditory hallucinations, mood disturbances, and delusions (for example, the sensation of insects creeping on the skin, which is called "formication"). The paranoia can result in homicidal as well as suicidal thoughts."[3]

Even though Haugen did not have a history of criminal convictions for crimes involving the infliction or threatened infliction of serious physical harm, his propensity for violent behavior existed.

Haugen's behavior was consistent with his history of methamphetamine use. Officer Brosseau had reason to conclude that Haugen was in an unstable frame of mind, and had no regard for his own life. *Haugen v. Brosseau, supra*, 339 F.3d at 865. It is reasonable to assume that Haugen had little regard for the life or safety of anyone else who might be in his way. Haugen was avoiding the police because of a felony no-bail warrant for drugs and other offenses. Haugen had a falling out with his partners in selling drugs and fixing cars. It was a 9-1-1 call about a fight between Haugen and his partners that brought

[3] *See* Research Report Series, *Methamphetamine Abuse and Addiction*, NIDA, U.S. Department of Health and Human Services, at www.nida.gov/Research Reports/methamph/methamph3.html, last update May 21, 2003.

Officer Brosseau to the scene. Haugen fled from Officer Brosseau and his partners on foot. He was free for over half an hour in a residential neighborhood. Officer Brosseau spotted Haugen running to his Jeep and gave chase. She caught up to him at the Jeep. They struggled for control of the Jeep. Officer Brosseau had her weapon drawn. She had ordered Haugen to stop. She broke the passenger window with her weapon. She struck Haugen on the side of his head with her weapon. She struggled with Haugen over possession of the keys. Haugen ignored and resisted all these attempts to stop and arrest him. Haugen had reached for the floorboard of his Jeep several times during this struggle, causing Officer Brosseau to fear that he might be reaching for a weapon. *Id.*, 339 F.3d at 864. Haugen gained control of his Jeep. He started the engine, and he was about to pull away. Haugen faced the Honda Civic directly in front of him containing his girlfriend and her young daughter. The driveway was further blocked at the end by a pick-up truck containing two adult males, Haugen's erstwhile partners. Officer Brosseau was standing next to the Jeep and behind Haugen. There were officers on foot in the area. *Id.*, 339 F.3d at 861. Officer Brosseau could not know in which direction Haugen might drive his vehicle and what his intent was. Haugen was not controlled or contained.

At this moment Officer Brosseau stepped back and fired one shot to stop Mr. Haugen from fleeing in his vehicle. The issue was not the flight. The issue was the reckless use of a vehicle in circumstances, which are capable of causing death or serious bodily injury. *Id.*, 339 F.3d at 878 (Guild, J., dissenting). In these circumstances, a vehicle may be a dangerous weapon. Rev. C. Wash.

9A.04.110(6)[4] and *State v. Hill*, 298 Or. 270, 692 P.2d 100 (1984).

Peace officers in circumstances similar to those faced by Officer Brosseau must be able to assess the situation immediately and determine whether the use of deadly force is justified. Peace officers do not have the luxury of lengthy deliberation. Peace officers, just as Officer Brosseau, must act quickly where the suspect is not in control and the peace officers are engaged in active pursuit and attempted arrest of an apparently desperate and dangerous suspect.

3. The Ninth Circuit's Decision Creates a Split Among the Circuits That Denies Fair Warning to Peace Officers.

The Ninth Circuit acknowledged Haugen's own statements that he "stood on the gas" to drive away and that he was in a "small, tight space," and the court acknowledged Officer's Brosseau belief that Haugen was likely to hit the Honda or the pick-up truck in his attempt to flee in his Jeep. *Haugen v. Brosseau, supra,* 339 F.3d at 861, 868. However, the court ignored Haugen's guilty plea to a felony eluding charge, which necessarily included an admission that he was driving in wanton and willful disregard of the lives and property of others. *Id.*, 339 F.3d at 878 (Guild, J., dissenting). This admission supports

[4] Rev. C. Wash. 9A.04.110(6) defines a "deadly weapon" to include a vehicle "which, under the circumstances in which it is used, or threatened to be used, is readily capable of causing death or substantial injury . . ."

Officer Brosseau's observation of Haugen's unstable frame of mind. Rather, the Ninth Circuit determined that any fear Officer Brosseau may have had for the safety of other persons in the immediate area was not supported by the facts. The court accepted Haugen's statement ". . . that he had an easy escape by driving off to the left around the Honda and pick-up." *Haugen v. Brosseau, supra,* 339 F.3d at 868.

The Ninth Circuit also found that the mere possession or display of a weapon was insufficient by itself to justify the use of deadly force. Therefore, the court said, suspicious movements alone would not justify the use of deadly force. *Id.,* 339 F.3d at 863, 865.

In considering the claim of qualified immunity, the court viewed the evidence "in the light most favorable to Haugen." *Id.*, 339 F.3d at 874. In effect, the court did not judge the use of force from the perspective of Officer Brosseau. Rather, the court judged the use of force from the perspective of Haugen.

This analysis diverges from the analyses of other circuits in cases involving similar circumstances. Other circuits have indicated that the use of deadly force is justified when the actions of a suspect gives an officer reasons to fear imminent injury from a weapon, whether the weapon be a gun or a vehicle.

The following cases involve similar circumstances where a vehicle was used in an attempt to escape: *Pace v. Capobianco,* 283 F.3d 1275 (11th Cir. 2002); *Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000); *Smith v. Freland,* 954 F.2d 343 (6th Cir. 1992); and *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991). All of these cases involved a high-speed vehicle chase. The shooting occurred after the suspect

vehicle was stopped and apparently blocked. The suspects remained in the vehicle with the engine running in all these cases. The officers involved in the shooting in the *Scott* and *Smith* cases were not standing in front of the vehicle. Three of these cases, *Pace*, *Scott*, and *Smith*, were precipitated as traffic stops. *Reese* involved pursuit of a man who was in the general vicinity of a reported robbery, and who fit the general description of a suspect in the robbery. None of the cases stated that the suspects had a prior history of serious violent crimes. In three of the cases, *Pace*, *Scott*, and *Smith*, the suspects ignored warnings from the officers to stop, and the officers fired one or more shots to prevent the suspects from fleeing. The prior high-speed chases and the manner in which the suspects drove indicated desperation to escape and dangerousness.

In *Haugen*, desperation to escape and dangerousness were indicated by the outstanding no-bail felony warrant, a history of methamphetamine use, flight on foot, active physical resistance to arrest, ignoring commands to stop given by an armed officer, and an attempt to flee in a vehicle while blocked by passenger vehicles containing civilians directly in front of the suspect's vehicle.

In *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992), the court noted that a vehicle can be a deadly weapon and that the suspect posed a danger, and in a statement that could be applied easily to Officer Brosseau's situation said:

> "After a dramatic chase, Officer Shulz appeared to have trapped his man at the end of a dark street. Suddenly Mr. Smith freed his car and began speeding down the street. In an instant Officer Shulz had to decide whether to allow his suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably."

The following cases involve similar circumstances where a peace officer feared that the suspect was armed: *Thompson v. Hubbard,* 257 F.3d 896 (8th Cir. 2001); and *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991). In both cases, the suspects made movements as if reaching for a weapon. In both cases, no weapon was found. In both cases, the suspects did not attack or show other aggression towards the officer or other persons. In both cases, dangerousness of the suspects was supported by pursuit of the suspects as persons that may have been involved in armed robberies. However, in both cases, the suspects were spotted by police in the general area of the robberies and only fit the general descriptions of the suspects. As noted above, other factors indicated desperation and dangerousness in the *Haugen* case.

In the *Reese* case the police approached a vehicle after a convenience store robbery. The court found that one suspect's actions of reaching with his right hand to the floorboard several times after being ordered to raise his hands could cause a reasonable officer to fear imminent and serious physical injury. The fact that there was no gun did not change the situation because the officer could not know that. *Id.*, 926 F.2d at 501.

In the *Thompson* case the court held:

> "An officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun. *See, Ryder v. City of Topeka*, 814 F.2d 1412, n. 16 (10th Cir. 1987) (concluding that, because a requirement that a suspect actually have a weapon would place police in "a dangerous and unreasonable situation . . . whether a

particular seizure is reasonable is dependent on the 'totality of the circumstances,' and not simply on whether the suspect was actually armed.")."

Thompson v. Hubbard, supra, 257 F.3d at 899 (where an officer stopped a vehicle containing a person fitting the description of a suspect involved in an armed robbery, and the person had fled on foot, jumped a short fence, had his back turned to the officer, and had reached at his waist level as though reaching for a weapon.).

The above issues demonstrate there is now a split in the circuits whether qualified immunity should be granted to a peace officer in circumstances similar to those faced by Officer Brosseau, considering what she reasonably knew of the facts at the time of the shooting and the notice she had from existing law at the time. Any reasonable peace officer considering the precedents concerning an apparently desperate and dangerous suspect seeking to flee in a vehicle or reach for a weapon would have concluded that the use of deadly force was justified. A peace officer in similar circumstances should be entitled to qualified immunity. As this court said in *Saucier v. Katz,* 533 U.S. 194, 202 (2001), "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law.")."

This court should not let the split in opinion among the circuit courts continue. To do so would be to deny peace officers fair warning whether deadly force may be justified in circumstances similar to those faced by Officer

Brosseau. As the cases cited in this brief indicate, these circumstances are not uncommon to law enforcement.

CONCLUSION

For the reasons stated herein, the PORAC Legal Defense Fund and its affiliates respectfully request that the Petition for Writ of Certiorari be granted to ensure that the standards for the proper use of deadly force in similar circumstances are clearly established.

Respectfully submitted,

MICHAEL J. HANSEN
Counsel of Record
GARRETTSON, GOLDBERG, FENRICH
& MAKLER, P.C.
5530 SW Kelly Avenue
Portland, OR 97239
503-226-3906

Attorneys for Amicus Curiae